**PAWA AJAH**

**v.**

**CHUNG KOK CHIANG & ANOR**

HIGH COURT SABAH & SARAWAK, SIBU
CLEMENT SKINNER J
[ORIGINATING SUMMONS NO: 24-100-2000]
31 JANUARY 2002

***LAND LAW:*** *Dealings in land - Native Area Land - Rights and privileges - Power of Attorney - Grant of rights and privileges in respect of Native Area Land to non-native - Whether allowable - Whether prohibited by law - Land Code (Cap 81) (Sarawak), ss. 8(a), (b), 9, 188, 189, 190(3) - Contracts Act 1950, ss. 2, 24 - Limitation Ordinance (Cap. 49), Items 91, 93, 112 of Schedule thereto*

***WORDS AND PHRASES:*** *"Acquire" - Section 8(a) Land Code (Cap 81) (Sarawak) - Whether meant 'to become the owner of property'*

Nyanau anak Bunya ('Nyanau') in this case is the registered proprietor of a piece of land classified as Native Area Land in Kanowit, Sarawak ('the land'). In 1991 Nyanau created a power of attorney in respect of the land in favour of the first defendant, a non-native, authorizing the latter to deal with the land. Thereafter, the first defendant sold the land to the second defendant and executed a memorandum of transfer in respect thereof. Following Nyanau's death in 1998, the plaintiff, the widow and administratrix of Nyanau's estate, applied for declarations that the power of attorney and the unregistered memorandum of transfer were null and void, having contravened s. 8 of the Sarawak Land Code ('the Code') as well as ss. 2 & 24 of the Contracts Act 1950 ('the Act'). It was not in dispute that s. 8 of the Code prohibited acquisition of any right or privilege by a non-native over Native Area Land, and that ss. 2(g) & 24 of the Act made void an agreement entered into for an illegal purpose. These provisions notwithstanding, the defendants argued that the grant of the power of attorney was allowable under s. 188 of the Code. They further argued that the plaintiff's claim herein, having been filed some nine years after the grant of the power of attorney, was barred by limitation.

Before the learned judge, the primary issues that arose were: (i) whether the power of attorney had been entered for an illegal consideration and was hence invalid; and (ii) whether the plaintiff's claim was barred by limitation by virtue of Items 91 & 93 of the Schedule to the Limitation Ordinance (Cap 49) ('the Ordinance').

**Held:**

**[1]** The general power given to a registered proprietor of land to appoint any person to act on his behalf in respect of his estate or interest in the same under s. 188 of the Code is qualified by the express prohibition contained in s. 8 of the Code where the land in question is Native Area Land. (p 759 d)

**[2]** The proposition that by accepting for registration the power of attorney herein the Assistant Registrar had recognized its legality is untenable. There is nothing in s. 189 of the Code which suggests that when accepting for registration a power of attorney, the registrar is under a duty to address his mind to the legality or validity of the same. (p 759 e-f)

**[3]** The Land Code is a statute dealing with matters relating to the general public, and that being so, it is presumed to use words in their popular sense. Consequently, the court would interpret the word 'acquire' in the context in which the word appears as meaning no more than to 'gain' or 'obtain' or 'exercise' rights and privileges over Native Area Land. (pp 762 f-g & 763 a)

**[4]** As made clear by ss. 8 & 9 of the Code, the intention of the Code is directed at prohibiting and preventing any person who is a non-native of Sarawak from acquiring any rights or privileges over Native Area Land, except in the very limited circumstances permitted therein. And to prevent evasion, any agreement that is entered into which would result in such rights and privileges being enjoyed by a non-native is deemed to have been entered into for an illegal consideration as would expose the parties to penal sanctions. It is not the case of the defendants here that they had come within the limited exceptions mentioned in s. 9 of the Code. (p 765 d-g)

**[5]** By the power of attorney, the unrestricted right to sell the land, to rent out or lease or charge or mortgage the same, and the right to convert the title, *inter alia*, had been acquired by the first defendant. It is indeed apparent that, practically every right and privilege over the land, except of the nominal ownership of the land, had been parted with by Nyanau. The first defendant had thus acquired rights and privileges over the land by virtue of the power of attorney. (p 767 a-b)

**[5a]** The power of attorney was entered into in contravention of s. 8 of the Code and was of such a nature that, if permitted, would defeat the provisions of s. 8 of the Code, by reason whereof it is unlawful and void under s. 24 of the Contracts Act. (p 768 e)

**[6]** The plaintiff's action came under Item 112 of the Schedule to the Ordinance being a suit 'for possession of immovable property or any interest therein not hereby otherwise specially provided for'. The time limited for bringing such suit is 12 years and begins to run 'when the possession of the defendant becomes adverse to the plaintiff'. (p 769 c-d)

**[6a]** Assuming that possession of the land became adverse to the plaintiff from the date of the execution of the power of attorney on 16 October 1991, it being the date the first defendant began to enjoy rights and privileges over the land, limitation would set in on 16 October 2002. This action having been commenced on 21 July 2000, it was brought well within the time allowed. (p 769 e)

*[Application allowed.]*

**Case(s) referred to:**

*Borneo Housing Mortgage Finance Bhd v. Bank Bumiputra Malaysia Bhd [1991] 2 CLJ 1497; [1991] 2 CLJ (Rep) 359 HC* ***(refd)***

*Dato' Hj Nik Mahmud Daud v. Bank Islam Malaysia Bhd [1998] 3 CLJ 605 CA* ***(dist)***

*Eng Mee Yong v. Letchumanan [1979] 2 MLJ 212* ***(refd)***

*Law Tanggie v. Untong Gantang & Anor [1993] 2 MLJ 530* ***(dist)***

*Malayan Banking Bhd v. Agencies Bureau Sdn Bhd & Ors [1982] CLJ 66; [1982] CLJ (Rep) 217 FC* ***(refd)***

*Manang Lim Native Sdn Bhd v. Manang Selaman [1986] 1 MLJ 379* ***(refd)***

*Mohamed Amin v. Ng Ah Siew [1935] MLJ Vol iv* ***(foll)***

*Re Estate of Choong Lye Hin [1977] 1 MLJ 96* ***(refd)***

*Re the Central Provinces and Berar Act [1939] FCR 18* ***(refd)***

*Wee Tiang Peck v. Teoh Poh Tin [1995] 1 MLJ 446 HC* ***(dist)***

**Legislation referred to:**

Contracts Act 1950, ss. 2(g), 24
Evidence Act 1950, s. 114(e)
Land Code (Cap 81) (Sarawak), ss. 8(a), (b), 9, 188, 189, 190(3)
Limitation Ordinance (Cap 49) items 91, 93, 112
Rules of the High Court 1980, O. 15 r. 6
Stamp Act 1949, s. 51(1)(d)

**Other source(s) referred to:**

*Boustead on Agency,* 15th edn, p 28
Maxwell, *Interpretation of Statutes,* 11th edn, p 53
Surendra Malik, *Words and Phrases,* 1993 edn, pp 12, 13, 16

*For the plaintiff - Polycarp Teo Sebom; M/s Teo Sebom Tan & Mahdi*
*For the defendants - Hii Hieng Sing; M/s Hii & Co*

*Reported by WA Sharif*

## JUDGMENT

**Clement Skinner J:**

By this originating summons the plaintiff Pawa ak. Ajah, the administratrix and widow of one Nyanau anak Bunya (deceased) (hereinafter 'Nyanau') seeks by way of relief several declarations and orders relating to a piece of land owned by the late Nyanau known as Lot 42 Block 8 Lukut Land District, located at Mile 12 1/2 Durin Kanowit Road, Kanowit (hereinafter 'the said land').

Before describing the particular relief sought by the plaintiff, it will be more convenient to first set out some background facts and details which from the affidavits filed on behalf of the parties and the submissions of their respective counsels, there does not appear to be any dispute about.

The late Nyanau died intestate on 20 February 1998 and at the date of his demise was the registered proprietor of the said land the extract of title of which shows that it is classified as Native Area Land. The Letters of Administration which was granted to the plaintiff on 15 June 1998 lists the said land as one of the assets of the estate of the late Nyanau. Some two years later, on 15 May 2000, the Probate Officer Kanowit added to the list of assets of the estate the "right to bring or to defend any action or other legal proceedings in the name and on behalf of the deceased or the deceased's estate."

Some seven years before his death, in consideration of the payment of the sum of RM30,000 by the first defendant Chung Kok Chiang @ Chong Kok Kiong, Nyanau executed an irrevocable power of attorney in favour of the first defendant on 16 October 1991 authorising him to deal with the said land and all Nyanau's interest therein in the manner set out in the power of attorney which was registered at the Sibu Land Registry Office on the same day as it was executed as Instrument No. L.9305/91 (hereafter 'the power of attorney'). It is not in dispute that the first defendant is a non-native of Sarawak (he is Chinese).

After her appointment as administratrix, the plaintiff lodged a caveat against the said land on 30 December 1999, to "forbid the registration of any transfer or other dealings" affecting the said land. The plaintiff also, on 17 January 2000, wrote a letter to the first defendant notifying him of the death of Nyanau on 20 February 1998 and of her appointment as administratrix of the estate of the late Nyanau. She also informed him of the caveat she had lodged against the said land and made a demand for a return of the title deed to the said land.

The plaintiff has to date not received back the issue document of title to the said land because the following events have taken place regarding the same:

(i) it appears that on 8 June 1997, the first defendant acting pursuant to the powers granted to him under the power of attorney executed a memorandum of transfer purporting to transfer the said land to one Regina Mado anak Bangau (hereafter 'Regina Mado') who is the wife of the first defendant's nephew in consideration of the sum of RM30,000 allegedly paid by her to Nyanau;

(ii) on 27 January 2000, on the strength of the unregistered memorandum of transfer of the said land in her favour, Regina Mado lodged a caveat against the said land claiming to be "entitled to or beneficially interested" therein. Her caveat was duly registered as Instrument No. L.927/2000 at the Land Office, Sibu.

On 31 July 2000 the plaintiff commenced this action. It is pertinent to mention here that on its commencement, the only defendant named therein was the first defendant. The following relief was claimed by the plaintiff (which I set out in summary):

(i) a declaration that the power of attorney executed by Nyanau is invalid, null and void;

(ii) that the registrar of the Sibu Land Registry Office remove and/or de-register the power of attorney;

(iii) a declaration that the power of attorney had become invalid and void on the death of the said Nyanau on 20 February 1998;

(iv) a declaration that the unregistered memorandum of transfer dated 8 June 1997 is invalid, null and void;

(v) an order that the defendant do deliver the issue document of title to the said land to the plaintiff;

(vi) an order that the defendant do deliver vacant possession of the said land to the plaintiff and demolish a building erected on the said land for cock-fighting purposes.

When the application came on for hearing, it became apparent to me from what was disclosed in the affidavits filed and the submissions of counsel for the plaintiff that the issues raised between the plaintiff and the first defendant affected the position of Regina Mado because the plaintiff was seeking to have the power of attorney declared invalid and void and any decision I

may make thereon would definitely affect her claims to the said land as the unregistered memorandum of transfer which she relies upon for her entitlement to a beneficial interest in the said land was executed by the first defendant on the strength of the power of attorney, the validity of which was now being attacked in these proceedings. As she had a right to be heard on the matters in issue between the plaintiff and the first defendant I acted under O. 15 r. 6 Rules of the High Court 1980 and ordered that she be made a party in these proceedings and named as the defendant and for all the cause papers to be served on her and that she be at liberty to file such affidavits as she may be advised to in these proceedings. In the event, she availed herself of that opportunity and filed two affidavits to oppose the plaintiff's application. She is represented by the same counsel who acts for the first defendant.

With that I now turn to the contentions of the parties. Before doing so I should mention that the defendants raised several objections to the plaintiff's application which they did not pursue. Thus, the defendants had questioned the plaintiff's authority to commence these proceedings and also complained that the originating summons was defective as it does not require the plaintiff to appear in the action nor does it expressly pray for the reliefs sought. But as I said, counsel for the defendants dropped these objections and so no more will be said about them.

The case for the plaintiff has been argued on the basis that the power of attorney granted by Nyanau in respect of the said land which is Native Area Land, in favour of the first defendant who is a non-native, is invalid and absolutely null and void as being contrary to s. 8 of the Sarawak Land Code ('the Code').

The plaintiff says that it is void because the power of attorney conferred on the first defendant's rights and privileges over the said land which he was prohibited by s. 8 of the Code from acquiring. It was, therefore, granted or entered into for an illegal purpose, by reason whereof it constituted an invalid agreement within the meaning of s. 2(g) of the Contracts Act 1950 and, therefore, void under s. 24 of the same Act.

The plaintiff goes on to contend that if the power of attorney was void and of no effect, the memorandum of transfer which was executed by the first defendant on the strength of a void instrument was incapable of passing on or conferring any interest in the said land to the second defendant by reason whereof she was not entitled to lodge any caveat against the same.

The case for the defendants has been argued on the basis that the power of attorney is perfectly valid as it does not offend against s. 8 of the Code because what is prohibited by that section is the "acquisition" of any right or privilege by a non-native over Native Area Land but the first defendant had not "acquired" any rights or privileges over the said land by virtue of the power of attorney; he was merely authorised and appointed by the late Nyanau to do certain acts on his behalf in relation to the said land. According to counsel for the defendants, to "acquire" means to become "owner of" but the first defendant had not, by virtue of the power of attorney, acquired any rights and privileges over the said land as if he had become the owner thereof.

The defendants go on to contend that if the power of attorney is valid then the said land had been sold by Nyanau (through the first defendant as his attorney) prior to his death to the second defendant and as the first defendant had received the full purchase price of RM30,000 as attorney of Nyanau and executed and delivered to the second defendant the memorandum of transfer in respect of the said land as well as hand over possession of the said land to her, Nyanau had divested himself of all his beneficial interest in the said land and had constituted himself as a bare trustee of the same for the second defendant. Therefore, according to counsel for the defendants, at the date of Nyanau's death the said land did not form part of the assets of his estate, by reason whereof, the plaintiff's action herein must fail. In support of the defendants' contention that Nyanau had constituted himself a bare trustee for the second defendant, counsel for the defendants relied on the case of *Borneo Housing Mortgage Finance Berhad v. Bank Bumiputra Malaysia Bhd.* [1991] 2 CLJ 1497; [1991] 2 CLJ (Rep) 359 (HC) the headnote of which reads:

> A registered owner by executing a memorandum of transfer or upon receipt of the purchase price in full, had divested himself of all beneficial interest in the land and vested it in the *bona fide* purchaser. The registered owner becomes a bare trustee for the purchaser.

Another ground relied upon by the defendants to defeat the plaintiff's action is limitation. It is the contention of the defendants that the power of attorney is a contract made between the late Nyanau and the first defendant and any action based on that contract must be brought within three years of its creation. According to counsel for the defendants, the relevant period of limitation is that mentioned in Item 91 and/or 93 of the Schedule to the Limitation Ordinance (Cap. 49) Laws of Sarawak. Item 91 prescribes a period of three years to bring an action for "the rescission of a contract", the time for which begins to run when the facts entitling the plaintiff to have the contract rescinded first became known to him. Under Item 93, the time to bring an action "for compensation for the breach of any contract, express or implied, not in writing and not herein

specially provided for" is three years, the time for which begins to run when the contract is broken, or, where there are successive breaches, when the breach in respect of which the suit is instituted occurs, or, where the breach is continuing, when it ceases.

It is the contention of the defendants that as this suit was commenced on 31 July 2000, more than three years had elapsed since the creation of the power of attorney on 16 October 1991 by reason whereof the plaintiff's claim is now barred by statute as limitation has set in.

Having set out the contentions of the parties, it is quite evident to me that the following issues arise for determination:

(i) Does the power of attorney offend against s. 8 of the Code so as to render it invalid, null and void as having been entered into for an illegal consideration?

(ii) If so, is the plaintiff prevented from obtaining the relief she seeks by reason of her action being barred by limitation?

With regard to the first issue, counsel for the defendants took two points. He first said that the power of attorney such as that granted to the first defendant is an instrument provided and prescribed by section 188 of the Code which reads:

> A registered proprietor of any estate or interest in land may by power of attorney in any usual form, and either in general terms or specially authorise and appoint any person on his behalf to execute transfers or other dealing therewith.

Counsel for the defendants then drew attention to s. 189 of the Code which requires every power of attorney intended to be used for the purpose of effecting a dealing under the Code to be registered with the registrar at the relevant land office and counsel further drew attention to the fact that the power of attorney had been duly registered at the Sibu Land Office registry by the assistant registrar on 16 October 1991 as Instrument No. L.9305/1991. Based on those facts it was the submission of counsel for the defendants that if, as contended by the plaintiff, the power of attorney was invalid, null and void the assistant registrar would have rejected it. Instead, according to counsel, by registering the power of attorney, its legality and validity had been recognised and the assistant registrar's act in accepting and registering the power of attorney amounts to an official act, which, by s. 114(e) of the Evidence Act 1950 the court is enjoined to presume as having been "regularly performed" and, therefore, according to counsel, for all purposes the power of attorney was correctly registered and its validity cannot be called into question by anyone.

I must at once register my dissent to the arguments of counsel for the defendants. In the first place, while it is true to say that s. 188 of the Code recognises that a registered proprietor of land may authorise and appoint any person on his behalf to deal with his estate or interest in land, it does not in law follow that the section is to be read as authorising what is otherwise prohibited by another section of the Code because to do so would be to read s. 188 in isolation and in total disregard to the other provisions in the same enactment and the intention behind the enactment. In this regard, useful reference can be made to the salutary advice of Gwyer CJ in *Re the Central Provinces and Berar Act* [1939] FCR 18 at p. 42 where he said:

> A grant of power in general terms standing by itself would no doubt be construed in the wider sense; but it may be qualified by other express provisions in the same enactment, by the implications of the context, and even by considerations arising out of what appears to be the general scheme of the Act.

Thus, it is my view that the general power given to a registered proprietor of land to appoint any person to act on his behalf in respect of his estate or interest in the same under s. 188 of the Code is qualified by the express prohibition contained in s. 8 of the Code where the land in question is Native Area Land.

In the second place, the proposition that by accepting for registration the power of attorney the assistant registrar had recognised its legality and validity is, with all respect of counsel, untenable. Section 189 of the Code imposes a requirement for every power of attorney to be registered with the registrar if it is intended to be used for the purpose of effecting a dealing under the Code. There is nothing in the section whether by express words or by implication to suggest that when accepting for registration a power of attorney, the registrar is under a duty to address his mind to the legality or validity of the same so that it can be said, as counsel for the defendants has said, "if the power of attorney was null, invalid and void the assistant registrar of the Sibu Land Registry Office would have rejected it." In my judgment, the registrar performs a purely administrative function when he accepts a power of attorney for registration. And in relation to any instrument that is executed by an attorney which is presented for registration to the registrar, only a very limited duty is imposed on him by s. 190(3) of the Code which reads:

> The Registrar, before registering any instrument executed by an attorney, may require proof that the power of attorney under which the attorney purported to act was still in force at the date of the execution of the instrument.

But it will be noticed that the duty imposed on the registrar to enquire about the validity of the power of attorney is only at that time when any instrument executed by an attorney is presented for registration, and not when the power of attorney itself is presented for registration.

In my judgment, there is in law very little difference between the function performed by the registrar in accepting a caveat for registration and when he accepts a power of attorney for registration. And it has been held that in accepting a caveat for registration, a registrar's role is purely administrative; that is what Lord Diplock had to say on the matter in the much cited case of *Eng Mee Yong v. Letchumanan* [1979] 2 MLJ 212, (at p. 214 para. B) although he was there referring to the registrar's functions under the provisions of the National Land Code.

In the third place, I find quite unacceptable, the argument of counsel for the defendants to the effect that because the registrar performs an official act when he registers a power of attorney which, by reason of s. 114(e) of the Evidence Act 1950, is to be presumed to have been regularly performed, the validity of the power of attorney cannot be questioned. It is my view that the provisions of s. 114(e) are quite irrelevant to the issue at hand. Here, although the plaintiff is seeking to have the power of attorney declared as invalid and to have the same de-registered, she does not seek to do so on the ground that the power of attorney has become registered as a result of some administrative act wrongfully or incorrectly performed by the registrar. If that were the case, then it is possible that the provisions of s. 114(e) of the Evidence Act 1950 may become relevant. Here, the plaintiff's attack against the validity of the power of attorney is on the ground that it was given in contravention of s. 8 of the Code and having been given for an illegal consideration or object is invalid, null and void, which are matters unconnected with the administrative function performed by the registrar when registering the power of attorney.

I next consider the crucial question of whether the power of attorney is caught by s. 8 of the Code. In arguments before me, counsel for both the plaintiff and the defendants have proceeded on the basis that the legal relationship between the donor and donee of a power of attorney is that of principal and agent and that this relationship was created, in the present case, by the power of attorney. Thus, both counsels referred me to the case of *Wee Tiang Peck v. Teoh Poh Tin* [1995] 1 MLJ 446 where at p. 454, the learned judge had this to say:

A 'power of attorney' is defined as a formal instrument by which one person empowers another to represent him or act in his stead for certain purposes, see *Jowitt's Dictionary of English Law* (2nd edn.). Such instrument must be strictly construed according to well recognised rules. Once a power of attorney is created, the relationship of principal and agent arises between the donor and the donee of the power.

*Boustead on Agency* (15th edn) has this to say on the creation of such agency (at p. 28):

The relationship of principal and agent may be constituted:

(a) by agreement, whether contractual or not, between principal and agent, which may be express, or implied from the conduct or situation of the parties;

(b) ...

(c) ...

Again, I do not think there is any dispute between the parlies that the power of attorney in our case constituted an express agreement between Nyanau and the first defendant whereby Nyanau appointed the first defendant as his attorney and agent on the terms set out in the power of attorney.

The next question to be asked is: Did the first defendant (who is a non-native of Sarawak) acquire any rights or privileges over the said land by virtue of the power of attorney? It is the plaintiff's case that the first defendant had done so when he became entitled to exercise, under the terms of the power of attorney, the right to sell, charge, lease or otherwise deal with or manage the said land. According to the plaintiff, these are rights and privileges over Native Area Land which the defendant – a non-native – would not be able to exercise or enjoy but for the power of attorney.

It is however the submission of counsel for the defendants that the first defendant had not acquired any rights or privileges over the said land by virtue of the power of attorney because the key word in s. 8(a) of the Code is "acquire", but the first defendant had not "acquired" any rights or privileges over the said land; he had merely been authorised and appointed by the late Nyanau to do certain acts on his behalf in relation thereto. According to counsel for the defendants the word "acquire" appearing in s. 8(a) must be interpreted to mean to become the owner of property. In support of his contention counsel referred to Supreme Court on *Words and Phrases* by Surendra Malik 1993 edn. wherein the following definitions of the word appear at pp. 12, 13 and 16 respectively.

**"Acquisition"** – Constitution of India Art. 31(2) per Mukherjea J.

> Acquisition means and implies the acquiring of the entire title of the expropriated owner, whatever the nature or extent of that title might be. The entire bundle of rights which were vested in the original holder would pass on acquisition to the acquirer leaving nothing in the former ... *Charanjit Lal Chowdhury v. Union of India* AIR [1951] SC 41, 54.

**"Acquisition", "acquire"** – Punjab Sales Tax Act 1948, s. 2(ff)

> Acquisition is the act by which a person acquires property in a thing. "Acquire" is to become the owner of the properly. One can, therefore, acquire a property either by voluntary or involuntary transfer. *Devi Das Gopal Krishnan v. State of Punjab,* AIR [1967] SC 1895.

**"Acquisition of property"** – Constitution of India, art. 31(2) (After Fourth Amendment)

> Acquisition of property, in the context, means the extinction of the citizen's rights in the property and the conferment of the said rights in the State or the State owned corporation. Govindlalji Maharaj v. State of Rajasthan AIR [1963] SC 1638, 1659.

In my view the meaning given to the word "acquire" by the courts in India when interpreting that word in the context of the Constitution of India or Revenue Enactments in India can be of very little value in construing the meaning of a provision in a Sarawak Ordinance or the same word when used in a Sarawak Ordinance in an entirely different context.

From the submissions of counsel for the defendants, it is quite clear that he wishes to interpret s. 8 of the Code by reference to a single word, namely "acquire" and that he construes that word in its technical meaning. But he has not given any reason why that has to be so. We are here dealing with the Land Code which is a statute dealing with matters relating to the general public. In this regard, this is what Maxwell on *Interpretation of Statutes* 11th edn. has to say (at p. 53):

> In dealing with matters relating to the general public, statutes are presumed to use words in their popular sense.

And on the matter of construction of statutes, this is what Maxwell says at p. 6:

> In construing wills and, indeed, statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnancy or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the word may be modified so as to avoid that absurdity and inconsistency, but no further.

Accordingly, I would interpret the word 'acquire' in the context in which it appears as meaning no more than to "gain" or "obtain" or "exercise" rights and privileges over Native Area Land. By so interpreting that word, I do not think that construction would lead to any absurdity or repugnancy or inconsistency with the rest of the provisions of the section or of the Code.

Having said that, it is my view that the approach I should take in resolving this issue is that adopted by the appellate court in *Idris bin Haji Mohamed Amin v. Ng Ah Siew* [1935] MLJ (Vol. IV) where the court was called upon to interpret certain provisions of the Malay Reservation Enactment which prohibited the transfer or vesting of any right or interest of any Malay in reservation land to a non-Malay. In that case the court first determined the intention of the Enactment by reading the relevant sections of the Enactment and then examined the transaction that had been entered into between the appellant and the respondent as a whole before deciding whether there was an attempt to evade the provisions of the Enactment.

Reverting to the issue at hand, the provisions of ss. 8 and 9 of the Code read as follows:

**Illegal for non-native to acquire rights or privileges over land of certain classes**

8. Save as provided in section 9:

(a) a person who is not a native of Sarawak may not acquire any rights or privileges whatever over any Native Area Land, Native Customary Land or Interior Area Land;

(b) any agreement, purporting to transfer or confer any such rights or privileges or which would result in such person enjoying any such right or privilege, shall be deemed to have been entered into for an illegal consideration; and, in particular but without prejudice to paragraph (d), any consideration which shall have been paid or furnished shall not be recoverable in any court nor shall any relief be afforded to any person claiming that any consideration promised has not been paid or furnished;

(c) any person purporting to enter into an agreement to which paragraph (b) applies shall be guilty of an offence: Penalty, a fine of one thousand ringgit and, in the case of a native offender, an additional fine of a sum equivalent to the value of any consideration which the court is satisfied has been received by that native offender or has been received by another person on his behalf or by his direction;

(d) in any case in which a person is convicted of an offence under paragraph (b), the court may, if there is reason to believe that such person did not appreciate he was contravening paragraph (a) and had no reason to believe he was entering into a prohibited transaction, impose no fine and may also, if it has imposed an additional fine on a native offender and this paragraph applies to the non-native offender, order the payment to such non-native offender out of such fine of such sum by way of compensation to the non-native offender as it may deem fit in all the circumstances;

(e) subject as aforesaid and to any remedy for the recovery of any fine imposed, the rights and privileges of any native shall not be adversely affected by any agreement to which paragraph (b) applies;

(f) upon any conviction of an offence under paragraph (c), the court shall have power to order the eviction of any person, being a non-native or a person claiming under a non-native in possession or occupation of any land in relation to which the offence was committed, and may for such purpose by warrant addressed to any police officer order him to remove any such person as aforesaid;

(g) a complaint of an offence under paragraph (c) may be made by a District Officer or a Superintendent or by any person generally or specially authorised in that behalf by the Public Prosecutor, but may not be made by any other person; and

(h) notwithstanding anything in any other written law, a court of a Magistrate of the First Class may exercise without any limitation the jurisdiction conferred on the court by this section.

**Acquisition of land by non-natives**

9(1) Section 8 shall not be deemed to prohibit the acquisition by any non-native of any land to which the provisions of that section apply, or of any rights or interest in or over such land:

(a) under or by virtue of any law for the time being regulating prospecting for minerals, including mineral oils, or the taking of forest produce;

(b) whenever such non-native has become identified with and subject to any native system of personal law;

(c) whenever such non-native has been issued with any permit relating to Native Area Land or Native Customary Land, issued under any rules made under section 8A of the former Land (Classification) Ordinance, 1948 (Ord. No. 19/1948), or issued under rules in that behalf under section 213, to the extent of the rights conferred by such permit;

(d) where such non-native has been deemed to be a native, by the Majlis Mesyuarat Kerajaan Negeri, by notification in the Gazette, in respect of any category of dealing over Native Area Land as stipulated in the notification;

(e) whenever such non-native has been issued with any licence under this Code to extract and remove earth, gravel, clay, stone, coral, shell, guano, sand or lime.

(2) For the purposes of this section, a person shall be deemed to have become identified with and subject to any native system of personal law upon any event upon which any written law provides he shall become so identified and subject or if he is accepted by any native community as being identified with and subject to the system of personal law of such community.

From my reading of the provisions of ss. 8 and 9 of the Code, the intention of the Code, which cannot be any more plainly stated than in those two sections, is directed at prohibiting and preventing any person who is a non-native of Sarawak from acquiring any rights or privileges over Native Area Land, except in the very limited circumstances permitted by the Code. And to prevent evasion, any agreement that is entered into which would result in such rights and privileges being enjoyed by a non-native is deemed to have been entered into for an illegal consideration and exposes the parties thereto to a penal sanction as well. In this regard I draw attention to the decision in *Manang Lim Native Sdn. Bhd. v. Manang Selaman* [1986] 1 MLJ 379 where Sean SCJ speaking for the Supreme Court had this to say about ss. 8 and 9 of the Code (at p. 380):

> In our opinion, having regard to the provisions of section 9 of the Code, the prohibition contained in section 8 does not appear to be an absolute one but only a qualified prohibition and it seems to us that any dealing in Native Area Land by a native of Sarawak with a non-native may be allowed if it is specifically authorised by the Yang di-Pertua Negeri in Council.

I should point out, however, that it is not the case of the defendants here that they come within the limited exceptions mentioned in s. 9 of the Code.

With regard to the actual transaction that had been entered into between Nyanau and the first defendant, a perusal of the power of attorney shows that the following powers were conferred on the first defendant in regard to the said land:

(a) To manage and look after Nyanau's right title share and interest in the said land and to make outlays in connection therewith.

(b) To assign, sell and dispose off the said land or part thereof at such price as the first defendant deemed reasonable and to execute memorandum of transfer in favour of any purchaser.

(c) To receive the purchase price and to give a good receipt thereof.

(d) To mortgage, charge or raise loan with the said land and to execute all documents in respect thereof.

(e) To enter into a tenancy agreement or sublease of the said land and to receive and recover all rents.

(f) To pay quit rent and assessment for the said land.

(g) To bring or defend any legal proceedings touching on the said land.

(h) To apply for conversion of the land title to the said land or apply for subdivision amalgamation or mutation of the same in such manner as the first defendant thinks fit and to sign all documents in respect thereof including to surrender the said land.

(i) To apply to remove earth from the said land.

The power of attorney also states that the powers conferred on the first defendant having been given for valuable consideration, the power of attorney shall be irrevocable except with the written consent of the first defendant.

Now, it will be recalled that it was the submission of counsel for the defendants that the first defendant had not acquired any rights or privileges over the said land by virtue of what was stated in the power of attorney because it was his submission that the power of attorney merely authorised the first defendant to do certain acts on behalf of Nyanau. I regret I do not agree with this submission. Useful reference may once again be made to the case of *Idris bin Haji Mohd. Amin v. Ng Ah Siew (supra)* to ascertain what rights are normally regarded as comprised in ownership of land. This is what Thomas CJ had to say about the matter at p. 258:

> [A]lthough an out and out sale might not be effected, yet it might be possible to deal with land in a Malay Reservation so as to pass to a person not being a Malay all the rights which are comprised in the usual ownership, *viz.* the rights to the rents and profits, the rights to let again and again, the right to determine the price to be received for a sale of the land and the person (subject only to his being a Malay) to whom the land should be sold.

Reverting to the facts of our case, it is very evident that those rights which are comprised in the usual ownership of the said land *viz.* the unrestricted right to sell the said land, the right to rent out or lease the said land, the right to charge or mortgage or raise a loan on security of the said land, the right to convert the title of the said land or to subdivide and surrender it, have been acquired or gained or obtained or passed to the first defendant – a non-native and that has been made possible only by virtue of the power of attorney. I would also say that the execution of the power of attorney has resulted in those rights and privileges I have just mentioned being enjoyed and exercised by the first defendant. From the extent of the rights and privileges which have been granted over the said land under the power of attorney to the first defendant, it is very apparent that practically every right and privilege except the nominal ownership in the said land has been parted with by Nyanau. Thus, although the power of attorney states that the first defendant acts on behalf of Nyanau in exercising those rights, in reality they had passed to and were exercised and enjoyed by the first defendant. The power of attorney was, in my view, a colourable devise entered into to facilitate an evasion of the Code and in fact deemed to be entered into for an illegal consideration under s. 8(b) of the Code.

In an attempt to show that there was nothing wrong with the first defendant being granted a power of attorney over Native Area Land, counsel for the defendants referred me to several cases where dealings or arrangements entered into between the owners of Native Area Land or Malay reservation land on the one part and non-natives or non-Malays on the other part have been upheld by the court. I must say, however, that those cases are of no assistance to the defendants here as those cases are readily distinguishable.

In *Law Tanggie v. Untong ak. Gantang & Anor.* [1993] 2 MLJ 530, a non-native of Sarawak purchased a Native Area Land from a native owner. As the non-native was then under the age of majority and had yet to be declared as a native, he arranged for a native to act as his nominee and trustee to hold the said land. The court held that the arrangement was not contrary to the provisions of the Code as there was no intention to evade the provisions of the Code as the arrangement was made subject to the provisions of the Code ie, the non-native being declared a native and attaining his age of majority. Needless to say, such a situation does not obtain in our case.

In *Dato' Haji Nik Mahmud bin Daud v. Bank Islam Malaysia Bhd.* [1998] 3 CLJ 605, a Malay owner of reservation land entered into an arrangement with a bank licensed to carry on Islamic banking business in respect of 25 lots of reservation land thereby the owner would sell the lands to the bank which would then re-sell the lands back to the owner at a profit. The lands were then to be charged to the bank to secure a loan. It was necessary to enter into the above

arrangements as the loan was granted in accordance with the Islamic banking concept of Al Bai Bithaman. The owner subsequently sought an order to declare null and void the charges on the grounds that the arrangements entered into between the parties contravened the provisions of the Malay Reservations Enactment 1930 of Kelantan which prohibited any transfer or transmission or vesting of any right or interest of a Malay in reservation land to a non-Malay. The learned judge found that the arrangements entered into did not contravene the provisions of the Enactment because despite the sale and purchase agreements, the Malay owner remained the registered proprietor of the lands throughout and as there was no intention to transfer ownership, the provisions of the Enactment had not been transgressed as there was no attempt to evade the Enactment. That is not the situation in our case. Here, the power of attorney was clearly intended as a devise to evade the provisions of the Code.

In *Wee Tiang Peck v. Teoh Poh Tin* [1995] 1 MLJ 446, the court held that even though the power of attorney granted to the attorney did concern rights and interests in land, it did not run foul of the provisions of the Malay Reservation Enactment because under the Enactment there could only be a 'vesting' where the right or interest is indefeasibly vested in a person so as to form part of his property but the power of attorney in that case did not have the effect of doing so. In our case, the question of 'vesting' is quite irrelevant.

It follows from what I have said above that it is my finding that the power of attorney was entered into in contravention of s. 8 of the Code and is of such a nature that, if permitted, would defeat the provisions of s. 8 of the Code by reason whereof it is unlawful and void under s. 24 of the Contracts Act 1950.

Having found so, I now go on to consider the next question that arises for consideration, namely, is the plaintiff's claim for relief barred by limitation? I have already in an earlier part of this judgment set out the contention of the defendants on this issue and the relevant provisions of Items 91 and 93 of the schedule to the Limitation Ordinance (Cap. 49) which the defendants say the plaintiff's action is caught by. However, it is the submission of counsel for the plaintiff that the defendants have not expressly pleaded limitation in opposing the plaintiff's claim and so should be prevented from raising it. I do not think counsel for the plaintiff is correct in his contention. In *Re Estate of Choong Lye Hin* [1977] 1 MLJ 96 the Federal Court held that the Limitation Ordinance need not be mentioned by name but it would be sufficient for the defendant to say that the claim is time-barred by limitation or statute-barred. I should point out that no pleadings were delivered in this action as the plaintiff commenced her action herein by way of an originating summons. However, in his affidavit affirmed on 18 September 2000 and filed on 19 September 2000, the first

defendant has in para. 15 thereof stated that the plaintiff's action is statute-barred. In my view, that was sufficient to entitle the defendants to take the point on limitation in these proceedings.

Reverting now to the question whether the plaintiff's claim is barred under Item 91 and/or 93 of the schedule to the Limitation Ordinance, it is my view that it is not because the plaintiff's action herein is not for the rescission of a contract and neither does she pray for such relief. Neither is her claim for "compensation for breach of any contract, express or implied, not in writing" and, therefore, Item 91 and/or 93 can have no application to the plaintiff's claim.

In my judgment, the plaintiff's action comes under Item 112 of the schedule which covers suits:

> For possession of immovable property or any interest therein not hereby otherwise specially provided for.

The time limited for bringing a suit to which Item 112 applies is 12 years and begins to run:

> when the possession of the defendant becomes adverse to the plaintiff.

Although the plaintiff seeks the various declarations mentioned above, her action is essentially for possession of the said land which is one of the reliefs prayed for. Assuming that possession of the said land became adverse to the plaintiff from the date of the execution of the power of attorney on 16 October 1991 because that was when the first defendant began to exercise and enjoy rights and privileges over the said land, limitation would set in only on 16 October 2002. This action having been commenced on 21 July 2000, it was brought well within the time allowed.

Before concluding, I wish for completeness to deal with several other matters raised during arguments by counsel for both parties. It will be recalled that it is the defendants' case that the said land ceased to form part of the assets of the estate of the late Nyanau from 8 June 1997 because that was the day the first defendant signed the memorandum of transfer in favour of Regina Mado who subsequently used it for the purpose of lodging a caveat against the said land, claiming that she had acquired a beneficial interest therein. A copy of Regina Mado's caveat as well as the memorandum of transfer was exhibited to the first defendant's affidavit affirmed on 11 August 2000. A perusal of the memorandum of transfer shows that *ad valorem* stamp duty had not been paid on it.

Counsel for the plaintiff therefore objected to the defendant's reliance on the memorandum of transfer in these proceedings. During an adjournment in the course of these proceedings, the stamp duty on the memorandum of transfer was paid and the document duly endorsed with a note that a penalty had been imposed for late stamping. Counsel for the plaintiff maintains, however, that the document remains inadmissible. I regret I do not agree with that submission. In *Malayan Banking Bhd. v. Agencies Bureau Sdn. Bhd. & Ors.* [1982] CLJ 66; [1982] CLJ (Rep) 217, the Federal Court held that an unstamped document could be received in evidence on payment of the penalty provided under s. 51(1)(d) of the Stamp Act 1949.

Another matter which was raised by counsel for the defendants related to the fact that the plaintiff had in her affidavits, averred to matters about which she could not possibly have any personal knowledge about. It will be apparent from this judgment that I have not referred to nor relied on any of the matters which counsel for the defendants complains about.

In the result, I allow the plaintiff's claim with costs and grant her the declarations she seeks in prayers (i), (ii) and (iv) of the summons. I also make the orders sought in prayers (v) and (vi) against the second defendant but not the order for demolition as there is no reliable evidence that it was the defendants who put up the shed complained of.